

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the matter of

Nationwide Programmatic Agreement  
Regarding the Section 106 National  
Historic Preservation Act Review Process

WT Docket No. 03-128

**REPLY COMMENTS OF SBC COMMUNICATIONS INC.**

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## **SUMMARY**

In light of the comments submitted in this proceeding, SBC urges the FCC to amend the draft Nationwide Agreement to afford the most meaningful streamlining consistent with protecting Historic Properties. The Commission should focus first on its approach to the task, and should adopt the approach recommended here—defining classes of Undertakings using objective criteria carefully tailored to the task rather than subjective criteria or less well tailored objective criteria modified by subjective “add-ons” or exceptions—in order to best fulfill the intent of Congress as expressed in the National Historic Preservation Act. By using objective criteria, the FCC will naturally create less ambiguous rules that serve the public interest by making determinations easier for all parties and providing the certainty that telecommunications providers require in order to make large capital investments in the construction of infrastructure to make telecommunications services more widely, timely, and economically available.

SBC also urges the FCC to make certain specific changes to the draft Nationwide Agreement, in line with the approach suggested. In particular, SBC urges the FCC to adopt more objective criteria for (1) properties that are not listed in the National Register, (2) the industrial/commercial/government-office exemption from Section 106 review, and (3) the transportation corridor exemption from Section 106 review, and to use the advanced technical capabilities available, including those already in use by the FCC, to consolidate the information necessary for Applicants to determine whether a proposed Undertaking requires Section 106 review and which parties, if any, should be contacted with respect to an Undertaking in a specific location. Finally, SBC urges the FCC to adopt the recommendations in its initial Comments, including the specific recommendations in the Appendix, in order to produce a workable system for protecting Historic Properties and to provide meaningful streamlining for communications providers.

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SBC Communications Inc. (“SBC”) has reviewed the various comments submitted in this proceeding and respectfully submits these Reply Comments. SBC shares the FCC’s desire to streamline the procedures for reviewing certain Undertakings for communications facilities under the National Historic Preservation Act (“NHPA”), and supports the idea of adopting a document such as the proposed draft Nationwide Programmatic Agreement (“Nationwide Agreement”) to accomplish that goal. As the comments illustrate, meaningful streamlining and the concomitant public benefits will result only if the Nationwide Agreement brings greater certainty to determinations under the NHPA by (i) creating more objective criteria for evaluating the potential environmental effects of certain Undertakings and (ii) instituting procedures that produce determinations upon which the parties can rely. SBC believes that by implementing selected suggestions from the comments, as discussed below, the Nationwide Agreement will realize the public benefits attainable through streamlining the NHPA review process and, at the same time, fully protect Historic Properties.

**I. The FCC Should Adopt a Nationwide Programmatic Agreement That Effectively Realizes the Congressional Purpose of Streamlining Tower Siting and Construction While Protecting Historic Properties**

The Nationwide Agreement purports to streamline communications Undertakings in two ways. First, it exempts or excludes certain Undertakings, which have little or no chance of adversely affecting Historic Properties, from Section 106 review. Second, it sets forth procedures for Section 106 review in cases where an Undertaking is not exempt from review. Exemptions from review have the greatest potential to meaningfully streamline the Section 106 review process for communications Applicants,<sup>1</sup> and are therefore of great importance to SBC.

Exemptions from Section 106 review are part and parcel of NHPA. Congress specifically directed the Advisory Council on Historic Preservation (“Council”) to

promulgate regulations or guidelines, as appropriate, under which Federal programs or undertakings may be exempted from any or all of the requirements of this subchapter when such exemption is determined to be consistent with the purposes of this subchapter, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties.

16 U.S.C. § 470v. *See also* 36 C.F.R. § 800.14(b) (authorizing programmatic agreements in certain circumstances, notably “[w]hen nonfederal parties are delegated major decisionmaking responsibilities,” *id.* at § 800.14(b)(1)(iii)); *id.* at § 800.14(a)(4) (alternate procedures adopted pursuant to 36 C.F.R. Part 800 “substitute for the Council’s regulations for the purposes of the agency’s compliance with Section 106”); *id.* at § 800.14(c) (establishing criteria for exemptions).

The proposed Nationwide Agreement, like any “program alternative” under 16 U.S.C. § 470v and 36 C.F.R. § 800.14, is based on the proposition that some classes of Undertakings

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<sup>1</sup> As SBC noted in its initial comments, this is doubly true. Because the procedures for exempt Undertakings are less burdensome, Applicants will have an incentive to choose construction sites that are exempt, thus making their own lives easier and at the same time protecting Historic Properties generally by concentrating construction where it poses the least risk.

have little or no risk of adversely affecting Historic Properties. Like Congress, which authored the statute; like the Council, which issued the regulations; like the Working Group, which drafted the proposed Nationwide Agreement; and like the other industry commentators, SBC firmly believes that this proposition is true. Accordingly, in its initial comments, SBC urged the FCC to embrace the proposition and to fashion rules for the general case rather than the exceptional cases, relying on existing, effective safeguards to accommodate the exceptions.

In light of the comments filed in this proceeding, SBC again urges the FCC to focus on a final draft that fulfills the purpose intended by Congress—providing effective streamlining while fully protecting Historic Properties—by defining classes of Undertakings using objective criteria tailored to the task rather than subjective criteria or less well tailored objective criteria modified by subjective “add-ons” or exceptions. SBC is confident that this conscious focus on the approach to the task will pay big dividends in the form of a workable, useful system of rules that meaningfully streamlines the process for Applicants and fully protects Historic Properties.

**A. The FCC Should Adopt Maximally Objective Standards for Determining Which Undertakings Are Exempt from Section 106 Review Procedures**

Most industry commentators consider objective criteria strictly necessary to achieve any meaningful degree of streamlining.<sup>2</sup> SBC urges the FCC to adopt objective criteria wherever possible in the Nationwide Agreement, including the standards for Identification, Evaluation, and Assessment of Effects in Section VI; but most especially in the standards for exempting Undertakings in Section III. The very purpose of exempting classes of Undertakings is to avoid

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<sup>2</sup> See, e.g., Comments of PCIA—The Wireless Infrastructure Association (“PCIA”) at 7–12, 32; Comments of American Tower Corporation at iii, 4, 11; Comments of Cingular Wireless LLC (“Cingular”) at 7; Joint Comments of Western Wireless Corporation and T-Mobile USA, Inc. at 10–12; Comments of Ameritech Mobile Services, Inc. at 2; Comments of AT&T Wireless Services at 1–2; Comments of Fordham University at 1, 6, 9–10; Comments of the National Association of Broadcasters (“NAB”) at 9–12.

placing unnecessary burdens on Applicants in situations where there is little or no risk of adversely affecting Historic Properties. Consequently, the tests required to determine a site's eligibility for one or more exemptions should be objective tests that can be evaluated unambiguously without special training or research.<sup>3</sup>

Several commentors have argued that certain provisions of the draft Nationwide Agreement are too subjective or otherwise too difficult to assess to be useful standards for exempting Undertakings. In connection with the commercial/industrial/government-office exemption in Section III.A.4 and the transportation corridor exemption in Section III.A.5, Verizon cites determination of (i) the age of structures and (ii) whether the ground has been previously disturbed, and if so, to what depth, as such standards.<sup>4</sup> PCIA concurs regarding disturbed ground.<sup>5</sup> Cingular advocates allowing Applicants to determine commercial, industrial, or government-office use by zoning for an analysis under Section III.A.4.<sup>6</sup> NAB, Western Wireless, and T-Mobile advocate more objective criteria for the visual effects of Undertakings.<sup>7</sup> CTIA would simplify the exemption for Undertakings on commercial/industrial/government-office sites.<sup>8</sup>

A number of commentors urge the FCC to replace the phrase, “eligible for inclusion in the National Register,” with a more objective standard. For example, the Maryland Office of Information Technology, representing State public safety organizations, would define the term to

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<sup>3</sup> The paradigmatic objective criterion is measured distance or size. Criteria of this nature characterize the determination of “substantial increase” in tower size under the Collocation Agreement and the basic determinations under Sections III.A.4 and 5 of the draft Agreement.

<sup>4</sup> Comments of Verizon Wireless (“Verizon”) at 6–7.

<sup>5</sup> Comments of PCIA at 34.

<sup>6</sup> Comments of Cingular at 9–10.

<sup>7</sup> Comments of NAB at 9–13; Joint Comments of Western Wireless and T-Mobile at 12–16.

mean that an application for inclusion in the National Register had been filed.<sup>9</sup> PCIA and CTIA argue that Section 106 review is limited to properties that are listed in the National Register of Historic Properties (“National Register”) or have been “determined eligible” for inclusion by the Secretary of the Interior.<sup>10</sup>

SBC joins these commentors in urging the FCC to adopt maximally objective criteria. However, before addressing the details of the Agreement’s provisions, SBC believes that it is critically important for the FCC to focus on its approach to the task, in order to develop a Nationwide Agreement that meaningfully streamlines the Section 106 process for Applicants and at the same time fully protects Historic Properties. By keeping firmly in mind that all standards should be objective to the extent possible, most particularly those that will be used to determine whether one or more exemptions apply to a site, the FCC will maximize the benefits of the Nationwide Agreement both to Applicants and to Historic Properties and thereby serve the public interest by making telecommunications services more widely, more timely, and more economically available. SBC urges the FCC to adopt the following approach:

- Focus on tailored objective criteria. Discard subjective criteria or criteria requiring special expertise or research wherever possible, particularly for determinations of whether exemptions apply to a site;
- Tailor exemptions for the general case where little or no risk to Historic Properties can be reasonably presumed, not for the rare exceptional cases where construction may have a more than *de minimis* effect on a Historic Property notwithstanding the reasonable presumption.
- Trust the safeguards in Sections IX, X, and XI of the Nationwide Agreement to protect Historic Properties in the exceptional cases.

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<sup>8</sup> Comments of the Cellular Telecommunications & Internet Association at 34.

<sup>9</sup> Comments of the State of Maryland Department of Budget and Management, Office of Information Technology, at Section IV, proposed amendment to Section II.A.8 of the draft Nationwide Agreement.

<sup>10</sup> Comments of PCIA at 41–44; Comments of CTIA at 30–32.

**B. The FCC Must Not Allow Exceptions to Swallow the Exemptions**

1. Eligibility for Inclusion in the National Register

SBC supports the persuasive arguments of PCIA and CTIA that Section 106 review applies only to properties listed in the National Register or determined by the Keeper of the National Register to be eligible for inclusion in the National Register. Accordingly, the Nationwide Agreement should refer throughout to “properties listed in the National Register or determined by the Keeper of the National Register to be eligible for inclusion in the National Register” rather than to “properties listed in the National Register or eligible for inclusion in the National Register.”

2. Industrial/Commercial/Government-Office Exemption

Section III.A.4 of the draft Nationwide Agreement exempts from Section 106 review the construction of facilities no more than 400 feet tall on at least 10,000 square feet of property “that is in actual use solely for industrial, commercial, and/or government-office purposes,”<sup>11</sup> as long as no “structure 45 years or older is located within 200 feet of the proposed Facility, and . . . all areas to be excavated will be located on ground that has been previously disturbed as defined in Section VI.C.4.”<sup>12</sup> In its initial comments, SBC urged the FCC to define “structure” to exclude “small utilitarian structures such as road overpasses, culverts, and the like,” and to treat areas with at least two feet of fill as “previously disturbed.”<sup>13</sup> The Commission should make these changes.

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<sup>11</sup> Draft Nationwide Agreement at A-8–9. Adjacent property of the same nature may be aggregated to achieve the 10,000 square foot area.

<sup>12</sup> *Id.*

<sup>13</sup> Comments of SBC at A-1.

Verizon argues that determining the age of structures and the extent of previous ground disturbances are not objective tests that can be made without special expertise or research and, consequently, are inappropriate standards for determining whether an exemption applies to a site. Cingular urges the FCC to make this determination more objective by allowing Applicants to determine land use by zoning.

Some tribal and state preservation commentors oppose the industrial/commercial/government-office exemption, either categorically or in detail.<sup>14</sup> As SBC noted in its initial Comments and in these Reply Comments, above, there is no basis for a categorical opposition to exemptions from review—in fact, Congress specifically directed the Council to adopt exemptions consistent with the purposes of NHPA.

SBC urges the FCC to delete the reference to structures 45 years and older from this Section for the reasons given by Verizon, and in its place to refer to “structures listed in the National Register, or determined by the Keeper of the National Register to be eligible for listing.” SBC would leave the determination of an appropriate standoff distance from such structures to the Commission’s judgment after reviewing the comments and reply comments in this proceeding.

SBC concurs with Cingular that sites zoned for industrial, commercial, or government-office use should be eligible for this exemption. SBC also again urges the FCC to adopt its suggestion that Applicants need not determine the extent of previous excavation if the site is covered with at least two feet of fill.

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<sup>14</sup> See, e.g., Comments of the American Cultural Resources Association at 1 (200 feet is insufficient); Comments of the Civil War Preservation Trust at 2–3 (should be 400 feet rather than 200 feet); Comments of USET at 16–17 (opposing all exclusions); Comments of the Delaware State Historic Preservation Office (exclusion zones too small); Comments of

### 3. Transportation Corridor Exemption

Section III.A.5 of the draft Nationwide Agreement exempts from Section 106 review the construction of facilities no more than 400 feet tall if they are within, or no more than 200 feet outside, the boundaries of (i) a designated communications or utility right-of-way, (ii) a limited-access Interstate Highway with a speed limit of at least 55 MPH,<sup>15</sup> or (iii) a railway corridor in active use for passenger trains. There are three exceptions to this exemption. A Facility is not exempt from review if (1) the highway, railway, or communications structure “is included in the National Register and the setting or other visual element is identified as a character-defining feature of eligibility on the National Register nomination”; (2) the proposed Facility is within 200 feet of a structure that is 45 years or older; or (3) the proposed Facility “lies within ¾ mile of and is visible from a unit of the National Park System that is listed or eligible for listing in the National Register, or a National Historic Landmark.”<sup>16</sup> Footnote 5 proposes that SHPOs be allowed to opt out of the exemption where historic properties are likely to be present in the corridor. As with the industrial/commercial/government-office exemption, some tribal and state preservation commentors oppose the transportation corridor exemption, either categorically<sup>17</sup> or in detail.<sup>18</sup> As discussed above, there is no basis for categorical opposition to exclusions.<sup>19</sup>

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Oregon Parks and Recreation Department, State Historic Preservation Office at ¶ 1 (opposing industrial/commercial/government-office exclusion).

<sup>15</sup> In its initial Comments, SBC urged the FCC to clarify that this exemption also applies to interchanges and entrance and exit ramps to and from such highways. The FCC should now do so.

<sup>16</sup> Draft Nationwide Agreement at A-9.

<sup>17</sup> See, e.g., Comments of USET at 16–17 (opposing all exclusions).

<sup>18</sup> See, e.g., Comments of Delaware State Historic Preservation Office (exclusion zones too small); Comments of American Cultural Resources Association at 1–2 (exceptions too narrow); Comments of the Mississippi Band of Choctaw Indians at 1–2 (opposing corridor exclusion); Comments of the National Trust for Historic Preservation at 2–3 (proposing that

For the reasons given above, SBC urges the FCC to delete the reference to structures 45 years and older from this Section, and in its place to refer to “structures listed in the National Register, or determined by the Keeper of the National Register to be eligible for listing.” SBC would again leave the determination of an appropriate standoff distance from such structures to the Commission’s judgment after reviewing the comments and reply comments in this proceeding. Consistent with Section I.B.1 above, SBC urges the FCC to change the third exception to read, “(3) the proposed Facility lies within ¾ mile of and is visible from a unit of the National Park System that is listed in the National Register or has been determined by the Keeper of the National Register to be eligible for listing in the National Register, or a National Historic Landmark.”

A number of industry commentators have urged the FCC to extend this exemption to all limited-access high-speed highways, whether or not they are Interstate Highways, and to all active rail lines, whether or not they are in use for passenger service.<sup>20</sup> Starting with the rationale for this exemption—that highways and rail lines have a significant adverse effect on nearby properties, such that short communications towers would have, at most, a *de minimis* additional effect—it is hard to see how freight railways or non-Interstate high-speed highways have a less significant effect than passenger railways and Interstate Highways. Accordingly, SBC supports these commentators and urges the FCC to extend this exemption to all limited-access high-speed highways and all active rail lines.

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exclusions be restricted to within 25 feet of transportation corridor boundaries rather than 200 feet).

<sup>19</sup> See Section I.B.2, above.

<sup>20</sup> See, e.g., Comments of CTIA at 34–36; Comments of AT&T at 6.

**II. The FCC Should Coordinate With SHPOs and THPOs and Should Take Advantage of Advanced Capabilities to Consolidate the Information that Applicants Need In Order to Make Exemption Determinations and to Prepare Submission Packets**

Commentors from both industry and historical preservation organizations noted that Applicants should have improved access to the information that they need to make determinations under Sections III and VI of the Nationwide Agreement, particularly where there may be off-reservation tribal interests. Some commentors focused on the role of the FCC and the Council. For example, the National Trust for Historic Preservation states that “the FCC should be taking a much more active role in developing specific information and databases that will assist Applicants in identifying which tribes need to be consulted for undertakings in any given location.”<sup>21</sup>

Similarly, the Maryland Department of Budget and Management, Office of Information Technology, calls on the FCC to

establish a checklist similar to the Antenna Structure Registration process to determine if an Environmental Assessment is required. There should be specific criteria established, with appropriate definitions and examples, linked to the questions. The applicant responses to these questions will definitively establish whether the filing of an Environmental Assessment is required. The Commission and the Council should build this application to provide the applicant with an instant “Environmental Assessment required” or “Environmental Assessment not required” response once the questionnaire has been completed.<sup>22</sup>

Other commentors focused on the ultimate source of the information, the tribes themselves. Cingular proposed that SHPOs be the initial point of contact for Applicants, and keep lists of properties on which THPOs would identify “all properties within the SHPO’s

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<sup>21</sup> Comments of the National Trust for Historic Preservation at 4.

<sup>22</sup> Comments of the State of Maryland Department of Budget and Management, Office of Information Technology, at ¶ 3.

jurisdiction that tribes have indicated are of religious or cultural significance.” To be put on the SHPO’s list, the significance of such properties would be documented by tribes and the boundaries would be geographically defined by map coordinates or topological features.<sup>23</sup>

SBC agrees with these commentors that Applicants need better information about the existence of Historic Properties, particularly where tribal interests in off-reservation properties are concerned. SBC realizes the difficulty involved in creating comprehensive databases of historic preservation information, but respectfully suggests that leaving the job to communications companies at their own expense, one site at a time, is neither efficient (because communications companies are not the repositories of knowledge about tribal religious and cultural interests) nor fair.

While the full system envisioned by the Maryland Office of Information Technology may be out of reach today, the FCC should take steps to move in that direction. SBC agrees with many commentors that at the very least, a database system in which each interested party is responsible for ensuring that information about its interests in properties is submitted for collection, and the aggregated data is made available to Applicants as necessary to allow them to determine the existence of and contact information for all parties that have an interest in a given property, is necessary for proper functioning of the overall Section 106 review system. Further, SBC believes that some of the existing FCC databases and geographical database overlays should be a good starting point for such a project. SBC and other communications firms are willing to do their part in the effort to deploy communications services and protect Historic Properties. All other interested parties, both governmental and tribal, must also be willing to do theirs as well.

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<sup>23</sup> Comments of Cingular at 4–7, 10–11.

## **CONCLUSION**

For the reasons given above, SBC urges the FCC to (i) focus on its approach to streamlining Section 106 review; (ii) employ objective criteria tailored to the task; (iii) make rules for the general case; (iv) trust the safeguards in Sections IX, X, and XI to protect Historic Properties in the rare exceptional cases; (v) adopt the specific suggestions discussed above and in SBC's initial Comments; (vi) consolidate the information Applicants need to make determinations under Sections III and VI of the Nationwide Agreement; and (vii) adopt the particular suggestions made in the Appendix to SBC's initial Comments..

Respectfully submitted,

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